



00 SEP 18 AM 9:53

BY *Carrie* DEPUTY

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GEN-PROBE INCORPORATED.

Plaintiff,

v.

VYSIS, INC.

Defendants.

CASE NO. 99CV2668 H (AJB)

**PROTECTIVE ORDER**

Date: September 15, 2000

Time: 9:30 a.m.

Dept.: Courtroom A

Trial Date: Not Yet Set

WHEREAS, in the course of this litigation disclosure may be sought of information which a party or third party regards as being of a confidential, trade secret, proprietary, technical, commercial, or financial nature (hereinafter collectively referred to as "Confidential Information"); and

WHEREAS, the parties, GEN-PROBE INCORPORATED ("GEN-PROBE") and VYSIS, INC. ("VYSIS") desire to establish a mechanism to protect the disclosure of Confidential Information:

IT IS HEREBY ORDERED that the following shall govern the disclosure of Confidential Information in this action:

1. All originals or copies of transcripts of depositions, exhibits, answers to interrogatories and requests for admissions, and all documents, materials, tangible things and

No. 99CV2668 H (AJB)

50

1 information obtained by inspection of files or facilities or by production of documents (hereinafter  
2 collectively referred to as "Information") which sets forth, refers to, or contains any Confidential  
3 Information, may be designated by the party producing the Information either as "CONFIDENTIAL -  
4 [producing party's name]" or as "CONFIDENTIAL - [producing party's name] - ATTORNEYS ONLY"  
5 (i.e., "CONFIDENTIAL - GEN-PROBE - ATTORNEYS ONLY" or "CONFIDENTIAL - VYSIS - ATTORNEYS  
6 ONLY").

7 2. Any Information designated as CONFIDENTIAL or CONFIDENTIAL - ATTORNEYS  
8 ONLY and all Information derived therefrom (excluding such Information as is derived lawfully  
9 from an independent source), shall not be disclosed to anyone except as provided in Paragraphs 3,  
10 4 and 5, below, shall be used only for the purposes of this litigation, and shall not be used for any  
11 business, financial or other purpose whatsoever.

12 3. Information designated as CONFIDENTIAL shall not be given, shown, made available  
13 or communicated in any way to any person or entity other than the following:

14 (a) Lawyers for Gen-Probe:

- 15 (i) Cooley Godward LLP  
16 (ii) R. William Bowen, Jr.  
17 (iii) Peter R. Shearer  
18 (iv) Christine A. Gritzmacher

19 (b) Lawyers for Vysis:

- 20 (i) Finnegan, Henderson, Farabow, Garrett & Dunner LLP  
21 (ii) Wright & L'Estrange  
22 (iii) Norval B. Galloway

23 (c) Partners, members, associates, or employees of any of the foregoing lawyers  
24 assisting in this litigation;

25 (d) The Court and Court personnel and stenographic reporters at depositions  
26 taken in this action;

27 (e) The following individuals:  
28

No. 99CV2668 II (AJB)

1 (i) Officers, directors and up to three designated employees of GEN-  
2 PROBE; PROVIDED, HOWEVER, that GEN-PROBE must designate  
3 such employees and give notice to VYSIS of such designation not  
4 later than 10 days prior to the disclosure of any CONFIDENTIAL  
5 Information to such person;

6 (ii) Officers, directors and up to three designated employees of VYSIS;  
7 PROVIDED, HOWEVER, that VYSIS must designate such employees  
8 and give notice to GEN-PROBE of such designation not later than  
9 10 days prior to the disclosure of any CONFIDENTIAL Information to  
10 such person;

11 (f) Independent experts or consultants whose substantive advice is or will be  
12 used by a party hereto in connection with preparation for trial or trial of this  
13 action, as well as any employees, associates or independent contractors  
14 retained by those experts to assist in their work on this matter. Counsel  
15 desiring to disclose CONFIDENTIAL or CONFIDENTIAL - ATTORNEYS ONLY  
16 Information to such experts or consultants shall first obtain a signed  
17 undertaking, in the form of Exhibit A attached hereto, from each such expert  
18 or consultant. Such Information will not be disclosed to any such expert or  
19 consultant for a period of ten (10) days after service by facsimile, Federal  
20 Express or other next day mail of the signed undertaking upon opposing  
21 counsel. Proposing counsel shall also provide opposing counsel with  
22 information regarding the identities of the proposed experts or consultants,  
23 including their names, address and job titles, the name and addressees of  
24 their employers and a current curriculum vitae including a list of all persons  
25 or entities for whom such persons consulted or from whom they received  
26 income directly or indirectly during the prior four (4) years;  
27  
28

No. 99CV2668 H (AJB)

(g) Any person that originally authored or received the document, or gained knowledge of the Information it contains in the regular and ordinary course of business; and

(h) Independent contractors retained to assist with non-substantive aspects of the preparation for trial or trial of this litigation (e.g., copying services, graphics services, jury consultants, etc.).

4. Information designated as **CONFIDENTIAL - ATTORNEYS ONLY** shall not be given, shown, made available or communicated in any way to any person or entity other than those persons described in paragraphs 3(a), 3(b), 3(c), 3(d), 3(f), 3(g), and 3(h) above.

5. Third party discovery in this proceeding may involve disclosure of Confidential Information, which if designated in conformity with the provisions of this Order, shall be subject to the provisions herein and provide the non-party with all of the rights and obligations set forth herein. In order to expedite third party discovery, a copy of this Order and a letter generally informing the third party of its right to invoke the protections set out herein shall be served with all such discovery.

6. In the event that a producing party inadvertently fails to designate Information **CONFIDENTIAL** or **CONFIDENTIAL ATTORNEYS ONLY** or incorrectly so designates Information, that party may make a late designation or change the designation by so notifying in writing all parties to whom the Information has been disclosed. The receiving parties shall take reasonable steps to ensure that the Information is thereafter treated in accordance with the designation. Late designation shall not be deemed a waiver of the confidential status of the late designated Confidential Information. No person or party shall incur any liability hereunder with respect to disclosure that occurred prior to the receipt of written notice of belated designation.

7. If an opposing party desires to object to the submission of **CONFIDENTIAL** or **CONFIDENTIAL ATTORNEYS ONLY** Information to individuals identified in paragraph 3(f), it shall notify the proposing party in writing and by facsimile transmission (with original sent by First Class Mail), within the ten (10) day period referred to in paragraph 3(f) of its objection and the

No. 99CV2668 H (AJB)

09533906-021202

1 grounds therefore. If no such objection is made in such time and manner, the proposing party may  
2 disclose **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY** Information to such person  
3 subject to the subsequent provisions in this paragraph. If an objection is properly made and the  
4 dispute is not resolved on an informal basis between the proposing and objecting party, the  
5 proposing party shall, within twenty (20) days after such written objection, submit the matter on  
6 motion to the Court for ruling. In the event of such written objection, the proposing party shall  
7 withhold disclosure of **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY** Information to the  
8 objected individuals pending the ruling of the Court or written agreement between the parties to  
9 the dispute.

10 8. The attorneys of record shall maintain a file of all written agreements signed by  
11 persons to whom they have given materials designated as **CONFIDENTIAL** or **CONFIDENTIAL -**  
12 **ATTORNEYS ONLY**. Said file shall be made available upon request for inspection and copying by  
13 any attorney of record.

14 9. Counsel shall not disclose Information designated as **CONFIDENTIAL** or  
15 **CONFIDENTIAL - ATTORNEYS ONLY** to a witness testifying at a deposition except in strict  
16 conformity with the provisions of this Order. No such disclosure shall be made to any witness  
17 unless that witness is entitled by this Order to receive that Information or the party that produced  
18 that Information assents to the disclosure of such Information in writing or on the record of the  
19 deposition. If, during the course of any deposition, (a) an attorney of record for any party desires  
20 to make inquiry into Information subject to the designation **CONFIDENTIAL** or **CONFIDENTIAL -**  
21 **ATTORNEYS ONLY**, or (b) an attorney of record for a party asserts that an answer to a specific  
22 inquiry is subject to the foregoing designations, the attorney shall make such inquiry only in the  
23 presence of those persons authorized access to such Information. Such testimony shall be sealed,  
24 and the parties hereto shall treat it subject to the provision for disclosure set forth herein. Nothing  
25 in this paragraph shall preclude counsel at a deposition of a party witness from disclosing to the  
26 party witness confidential information produced by that party.

No. 99CV2668 H (AJB)

1 10. All testimony elicited during depositions, hearings, and other proceedings shall be  
2 deemed **CONFIDENTIAL - ATTORNEYS ONLY** until the expiration of thirty (30) days after the  
3 mailing or after delivery of a copy of the transcript of the testimony by the court reporter to  
4 counsel who requested a copy of the transcript. This paragraph will not otherwise affect the  
5 deposition, hearing or other proceeding which is being recorded while it is in session. Within the  
6 thirty-day period following such mailing of the transcript, any party may, by written notice served  
7 on all parties, designate all or any portion of the testimony to be **CONFIDENTIAL** or  
8 **CONFIDENTIAL - ATTORNEYS ONLY**. The right to make such designation shall be waived unless  
9 made before the end of the thirty-day period. Upon being informed that certain portions of a  
10 transcript are designated as **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY**, each party  
11 must cause each copy in their custody, possession or control to be so marked immediately.

12 11. Any court reporter who transcribes testimony in this action at a deposition shall  
13 agree, before transcribing any such testimony, that all **CONFIDENTIAL** and **CONFIDENTIAL -**  
14 **ATTORNEYS ONLY TESTIMONY** is and shall remain confidential and shall not be disclosed except  
15 as provided under this Order and that copies of any transcript, reporter's notes or any other  
16 transcription records of any such testimony shall be retained in absolute confidentiality and  
17 safekeeping by such shorthand reporter or shall be delivered to an attorney of record or filed with  
18 the Court.

19 12. Interrogatory answers and answers to requests for admissions designated as  
20 **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY** shall be delivered to the attorney of record  
21 propounding the interrogatories or requests without being filed with the Court unless required in  
22 any further proceedings herein. When documents so designated and/or other matters of the same  
23 or similar nature are the subject of inquiry at depositions, the portion of the transcript which sets  
24 forth or contains information about such, together with such documents, shall be sealed and shall  
25 not be filed with the Court unless required in any further proceedings herein.

26 13. No information that was designated previously as **CONFIDENTIAL** or  
27 **CONFIDENTIAL - ATTORNEYS ONLY** will be filed with the Court unless it is filed under seal. To  
28

No. 99CV2668 H (AJB)

1 comply with this requirement, **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY** Information  
2 must be filed in sealed containers labeled with: (1) the title to this action; (2) the general nature of  
3 the contents; (3) the words **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY**; and (4) a  
4 statement substantially in the following form:

5 **CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER.** This sealed  
6 container filed in this case, *Gen-Probe Incorporated v. Vysis, Inc.*,  
7 United States District Court, Southern District of California Case  
8 No. 99cv2668H (AJB), contains confidential materials, which may  
9 be used only in connection with the prosecution or defense of this  
10 lawsuit. Pursuant to Protective Order, the container shall not be  
11 opened nor the contents thereof revealed except to the Court. After  
12 any such opening or revelation, the container shall be resealed with  
13 the contents inside.

14 Nothing shall be filed under seal, and the court shall not be required to take any action,  
15 without separate prior order by the judge before whom the hearing or proceeding will take place,  
16 after application by the affected party with appropriate notice to opposing counsel.

17 14. Should an attorney of record for any party desire to use Information designated as  
18 **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY**, or any summary thereof or excerpt  
19 therefrom, during the trial of or at any hearing in this action, counsel shall, prior to such use, bring  
20 the confidentiality thereof to the attention of the Court and/or the party which designated the  
21 Information. Counsel for the producing party may request that any portion of the transcript or  
22 exhibit containing such Information be filed under seal with the Court, and be accorded protection  
23 as provided by the terms of this Order. All persons present at the time of such use shall be directed  
24 to treat such Information as Confidential Information, and counsel for the parties shall exercise all  
25 reasonable care not to disclose such materials needlessly in the public record of this proceeding  
26 nor to persons not entitled under this Order to receive such Information.

27 15. The designation by counsel for the disclosing party of any Information as  
28 constituting Confidential Information is intended solely to facilitate the preparation and trial of this  
case, and such designation shall not be construed in any way as an admission or agreement by any

No. 99CV2668 H (AJB)



1 party that the designated disclosure constitutes or contains any Confidential Information in  
2 contemplation of law.

3 16. Within sixty (60) days of the final disposition of this action, whether by judgment  
4 (including exhaustion of all appeals), settlement or otherwise each attorney of record shall  
5 promptly deliver to the party or witness from whom obtained either (1) all items which have been  
6 marked **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY** and all copies made thereof or (2)  
7 an affidavit sworn under penalty of perjury declaring that all such items and all copies thereof have  
8 been destroyed. However, the law firm of each attorney of record may retain one record copy of  
9 any items filed with the Court upon notice to the other attorneys of record of such retention and  
10 subject to the terms of this Order.

11 17. If a party desires to object to the designation of **CONFIDENTIAL** or **CONFIDENTIAL -**  
12 **ATTORNEYS ONLY** as applied to specific Information, it shall serve its objections in writing and by  
13 facsimile transmission (with original sent by First Class Mail). If the objections are not resolved  
14 on an informal basis between the designating party and the objecting party, the objecting party  
15 may, within twenty (20) days after service of such written objection, submit to the Court for ruling  
16 a noticed motion to be relieved entirely or in part from the provisions of this Order.

17 18. In the event anyone shall inadvertently disclose Information another party or third  
18 party has designated **CONFIDENTIAL** or **CONFIDENTIAL - ATTORNEYS ONLY**, the party making the  
19 inadvertent disclosure shall, upon learning of the disclosure:

20 (a) Promptly notify the person to whom the disclosure was made that the  
21 disclosure contains Confidential Information;

22 (b) Promptly make all reasonable and necessary efforts to obtain the return of  
23 and preclude dissemination or use of the Confidential Information by the person to whom  
24 disclosure was inadvertently made; and

25 (c) Immediately notify the producing party of the identity of the person to  
26 whom the disclosure was made, the circumstances surrounding the disclosure, and the steps that  
27  
28

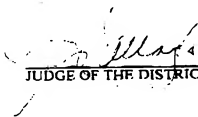
No. 99CV2668 H (AJB)

1 have been taken and will be taken to ensure against further dissemination or use of the  
2 Confidential Information.

3 19. In the event anyone shall violate, or threaten to violate, any terms of this Order, the  
4 parties hereto agree that the aggrieved party may immediately apply to obtain injunctive relief  
5 against any such person, and in the event the aggrieved party shall do so, the respondent person,  
6 subject to the provisions of this Order shall not employ as a defense thereto or claim that the  
7 aggrieved party possesses an adequate remedy at law.

8  
9 IT IS SO ORDERED.

10 Dated: \_\_\_\_\_

  
JUDGE OF THE DISTRICT COURT

11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28 No. 99CV1668 H (AJB)

EXHIBIT A

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA

GEN-PROBE INCORPORATED,

No. 99cv2668 H (AJB)

Plaintiff,

UNDERTAKING

v.

VYSIS, INC.,

Defendant.

I, \_\_\_\_\_, declare and say that:

1. I \_\_\_\_\_ live at \_\_\_\_\_

2. I am employed as \_\_\_\_\_ by \_\_\_\_\_

3. I have read the Protective Order entered *Gen-Probe Incorporated v. Vysis, Inc.*, Case No. 99cv2668 H (AJB), and a copy of the Protective Order has been given to me.

4. I agree to be bound by the terms of the Protective Order, and agree that any information designated as CONFIDENTIAL or CONFIDENTIAL - ATTORNEYS ONLY within the meaning of the Protective Order, will be used by me only to assist counsel in connection with the above-referenced litigation.

Case No. 99CV2668 H (AJB)

1 5. I agree that I will not disclose or discuss Information designated as **CONFIDENTIAL**.  
2 with anyone other than the persons described in Paragraph 3 of the Protective Order.

3 6. I agree that I will not disclose or discuss Information designated as **CONFIDENTIAL**  
4 - **ATTORNEYS ONLY** with anyone other than the persons described in paragraph 4 of the Protective  
5 Order.

6 7. I understand that any disclosure or use of Information designated as **CONFIDENTIAL**  
7 and **CONFIDENTIAL - ATTORNEYS ONLY** in any manner contrary to the provisions of the Protective  
8 Order will subject me to sanctions for contempt of the Court's Order.

9 8. I agree to be subject *in personum* to the jurisdiction of the United States District  
10 Court for the Southern District of California in connection with any proceeding relating to the  
11 enforcement of the Protective Order.

12 I declare under penalty of perjury that the foregoing is true and correct and that this  
13 declaration was executed this \_\_\_\_\_ day of \_\_\_\_\_, 2000, at  
14 \_\_\_\_\_  
15 \_\_\_\_\_  
16 \_\_\_\_\_  
17 \_\_\_\_\_  
18 \_\_\_\_\_  
19 \_\_\_\_\_  
20 \_\_\_\_\_  
21 \_\_\_\_\_  
22 \_\_\_\_\_  
23 \_\_\_\_\_  
24 \_\_\_\_\_  
25 \_\_\_\_\_  
26 \_\_\_\_\_  
27 \_\_\_\_\_  
28 \_\_\_\_\_

09533906 021200

**CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER.** This sealed container filed in this case. *Gen-Probe Incorporated v. Vysis, Inc.*, United States District Court, Southern District of California Case No. 99cv2668II(AJB), contains confidential materials, which may be used only in connection with the prosecution or defense of this lawsuit. Pursuant to Protective Order, the container shall not be opened nor the contents thereof revealed except to the Court. After any such opening or revelation, the container shall be resealed with the contents inside.